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In the Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC. ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS CASIMIR AND MARGARET BALONIS.

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BRIEF OF RESPONDENTS CASIMIR AND MARGARET BALONIS

This unprecedented class action purports to adjudicate the rights of untold millions of asbestos victims before their injuries arise and before the victims may even be aware that they are members of the class. Petitioners' proposal represents a corruption of Rule 23, a violation of due process, and a threat to the integrity of the judicial system.

STATEMENT OF THE CASE

1. The Judicial Conference Ad Hoc Committee. In 1990, the Chief Justice appointed a panel of six federal judges to study asbestos litigation and produce recommendations. Cert.App. 11a. The Judicial Conference Ad Hoc Committee on Asbestos Litigation issued its Report in March 1991 (hereafter "Report of the Ad Hoc Comm."). The committee's unanimous recommendation was to urge Congress to enact a legislative solution:

> The committee firmly believes that the ultimate solution should be *legislation* recognizing the national proportions of the problem in both federal and state courts and creating a national asbestos dispute resolution scheme ....

Report of the Ad Hoc Comm. at 3. In his separate statement dissenting from some of the Committee's other suggestions, Judge Hogan agreed that "a logical and viable solution would be the passage by Congress of an administrative claims procedure similar to the Black Lung legislation." *Id.* at 42.

The Committee also suggested a "Back Up Procedure for the Federal Courts" under which Congress, if unwilling to create the national claims procedure the Committee preferred, might "authorize class action or collective trials" of asbestos cases. *Id.* at 36. The Committee recognized that "virtually all of the issues

relating to a so-called 'national solution' are primarily matters of policy for Congress." *Id.* at 3.

> In the final analysis, the committee has concluded that congressional action is necessary to enable the courts to meet the unique problems presented by asbestos litigation.

Id. at 26. The Committee acknowledged that current procedural law seems to foreclose class action solutions to asbestos damages litigation. *Id.* at 38. The Committee specifically noted the need for congressional action if class actions were to be used to resolve the claims of "future claimants." *Id.* at 35.

During the district court proceedings in this case, the Reporter to the Ad Hoc Committee, Dean Mary Kay Kane, was called as a witness by the petitioners and the settling plaintiffs. She testified that she was appointed to draft legislative proposals that the Committee could urge the Judicial Conference to recommend to Congress, and that all the solutions to the asbestos problem considered by the Committee involved the need for federal legislation. Deposition of Mary Kay Kane, Jan. 31, 1994 at 35-36, 56-58, 74. Fairness Hearing Trans., Vol. I, 187-88 (Feb. 22, 1994). In particular, the Committee considered draft legislation to rewrite Fed.R.Civ.P. 23 to cover mass tort damages actions, and recognized the need to make such an amendment "through legislative action rather than through the rule-making process." Depo. of Dean Kane at 65.

In the end, the Committee decided not to make specific legislative proposals, largely because of the political challenges posed in getting comprehensive legislative solutions enacted, and chose just to urge the Judicial Conference to issue a general call for congressional attention to the asbestos problem. Depo. of Dean Kane at 37, 60.

In particular, the Committee recognized the federalism problems presented by a national solution to the asbestos litigation situation. The Report noted that any such solution would "involve special treatment of an area of tort liability

traditionally within the province of the states." Report of the Ad Hoc Comm. at 3. State law governs the vast majority of asbestos damages actions, and the substantive law varies tremendously from state to state, *id.* at 29, 32-33, which, the Committee noted, meant that any national solution accomplished without congressional changes to current law would inevitably raise grave concerns under the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Report at 20-21.

State court judges wrote and called the Committee to object that the "back up" national solutions it was considering would invade the province of state law and the state judiciary. Fair.Hrng.Trans., Vol. I, 192-93 (Feb. 22, 1994). Dean Kane testified that the Committee recognized that the "back up" proposals "dealt with making direct changes to state law" and otherwise "intruding on state law," and that this would create "major federalism problems." *Id.* at 200-01.

Dean Kane further testified that the Committee never even considered — let alone recommended — the possibility of addressing the asbestos problem through settlement class actions. *Id.* at 189, 212.

A strong dissenting statement was filed by Judge Hogan, who objected that class treatment of state-law asbestos claims would "conflict[] with the court's obligations to apply state law" and "establish a new form of tort liability with far-reaching ramifications for other mass tort cases." Report of Ad Hoc Comm. at 41. "This contortion of traditional tort concepts and class action procedures may well cause untoward problems." *Id.* at 42. Finally, the dissent warned against the siren song of appeals to pragmatism and exigency:

> This is a crisis, but it does not justify sweeping away traditional tort and class action concepts and possibly infringing on the due process and jury trial rights of the litigants.

Id. at 43.

The Center for Claims Resolution (CCR), a consortium of asbestos defendants who appear as petitioners here, produced its own report in response to the Committee. CCR acknowledged that the "Ad Hoc Committee properly recommended that *Congress* establish a nationwide administrative claims handling program for asbestos claims ...." JA 444 (emphasis added). But CCR argued that all of the other "back up" recommendations for judicial solutions were deeply misguided. JA 430-43. CCR pointed out that class action treatment of asbestos damages claims was impossible under current law. JA 434-35. Petitioners also noted that such solutions would entail fundamental changes in state law and have grave implications for the *Erie* doctrine and for due process of law. JA 431, 439-40, 443.

Finally, CCR explained that there was no need for such drastic "remedies" because the wave of claims for "significant impairment" has "crest[ed]." JA 432. According to OSHA research, "'asbestos mortality and severe asbestosis morbidity is on the decline' due to lowered workplace exposure levels in the past few decades." *Id.* (quoting OSHA findings). CCR debunked the "references to the number of claims filed in various courts" as "misleading," because those statistics overlook the fact that these anomalous surges in filings are "caused by the fact that judges in those districts ... have employed radical consolidation or class action techniques" that "naturally encourage hundreds or thousands of new claims to be filed." JA 432-33. That is especially true with respect to this class action, which for the first time has encouraged exposure-only plaintiffs to file suit for injuries that do not yet (and will probably never) exist.

2. The MDL Transfer. The Panel on Multi-District Litigation issued an order on July 29, 1991 transferring all federal personal injury asbestos cases to Judge Weiner in the Eastern District of Pennsylvania for coordinated pretrial proceedings. Cert.App. 112a. *In re Asbestos Products Liability Litigation (No. VI)*, 771 F.Supp. 415 (J.P.M.L. 1991)("MDL 875"). The MDL Panel expressed the hope that this order might offer an

opportunity to resolve those approximately 30,000 pending claims by settlement. Cert.App. 112a-113a.

During the settlement negotiations that arose out of the MDL proceeding, CCR made clear that it was most interested in resolving not just the pending asbestos claims that were the subject of the MDL transfer order, but potential *future* asbestos claims. Cert.App. 114a. The proposal of a single global settlement for "all present and future cases" that was offered by the Defendants' Steering Committee was flatly rejected by the Plaintiffs' Steering Committee. Cert.App. 114a-115a. The CCR defendants then decided to pursue, on their own, a settlement "on behalf of future asbestos victims." Pet.Br. 4.

3. The filing of the class action and the stipulation of settlement. This "case" began with the simultaneous filing of the plaintiffs' class action complaint, the defendants' answer, a joint motion for class certification, and a 106-page "Stipulation of Settlement" in federal court in Philadelphia on January 15, 1993. The class included everyone who had ever been occupationally exposed to CCR asbestos products (and their spouses and children) who had not filed a case against CCR prior to the filing of the settlement. Cert.App. 95a-96a. In the class action complaint, each of the nine named plaintiffs sought unspecified damages in excess of $100,000 against the twenty former manufacturers of asbestos-containing products named as defendants. JA 5. Five of the nine named plaintiffs alleged that they had sustained physical injuries as a result of exposure to the defendants' asbestos products. JA 5-10. Four of the named plaintiffs, however, expressly alleged that although they had been exposed to CCR's asbestos products, they had not yet sustained an asbestos-related "condition." *Id.* These "exposure-only" plaintiffs nevertheless alleged entitlement to damages for their risk of contracting an asbestos-related disease in the future, for their fear that they would contract such a disease, and for "medical monitoring." JA 18-20.

The defendants' answer denied the allegations of the plaintiffs' class action complaint, and asserted eleven affirmative defenses.

JA 23-26. But the two other filings jointly made by the parties that day — the joint motion for class certification and the stipulation of settlement — revealed the real reason that the parties came to court: not to seek judicial resolution of the claims alleged in the complaint, but to bind non-parties to a previously negotiated contractual settlement agreement, even though the overwhelming majority of the non-parties that would be bound do not currently have a legally cognizable claim that they could individually assert against the defendants. The joint motion asked the court to certify a nationwide opt-out class of all persons who had been occupationally exposed to asbestos-containing products made or sold by the CCR defendants — *whether or not such persons currently had an actionable, physical injury*. JA 29. In other words, persons who had not yet sustained physical injury, whose claims had not yet ripened, and who were protected by state laws from the running of statutes of limitations on any claims they might develop in the future, were nevertheless included in the proposed class.

The stipulation of settlement was equally ambitious. It purported to settle all claims of class members for asbestos-related personal injury or wrongful death against the CCR members — whether or not the claims had actually accrued — that had not, as of the date of filing, been asserted in the state or federal judicial systems. JA 49. The stipulation "settled" such future claims by channeling them to an evaluative process controlled by the CCR companies which would apply strict medical and exposure criteria, not recognized in the tort system, to determine whether a claim qualified for payment. JA 51-86. For those victims that qualify, the stipulation set a limited range of damages that can be awarded by CCR for the various asbestos diseases (confirmed asbestosis, lung cancer, mesothelioma, and other specified types of cancer), and placed caps on the amount that a particular victim may recover for a particular disease and on the number of qualifying claims that may be paid in any given

year. JA 110.[1] If a claimant who qualifies for a payment is dissatisfied with the settlement offered by CCR, he or she can reject the settlement and pursue the claim in the tort system — but only 1% of claimants can do so in any particular year. JA 87. Victims who do not qualify under the stipulation's exposure or medical criteria receive no payment, and are not eligible to contest their loss of remedy. Claims for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring — the claims that the named "exposure only" plaintiffs asserted in the class action complaint — receive no payment at all under the stipulation of settlement, and persons holding such claims may not appeal such loss of rights. Additionally, claims for certain malignant and non-malignant asbestos-related injuries which have substantial settlement value in the tort system are released under the stipulation for no monetary compensation (and without right to appeal).

4. Proceedings in the district court. Two weeks after suit was filed, the district court conditionally certified the proposed class as the settling parties had jointly requested — without notice to the class and without a hearing. Cert. App. 70a. Thereafter, putative class members who had learned of the class action sought to appear for the purposes of challenging the court's jurisdiction and asserting objections to the settling parties' request for a preliminary finding that the settlement was within the range of possible approval. The objecting class members argued, *inter alia*, that the district court lacked subject matter jurisdiction because (1) the case did not present the court with a bona fide "case" or "controversy" between adversaries over which it could exercise jurisdiction under Art. III, § 2, (2) the "exposure-only"

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[1] Victims who are found by CCR to have "extraordinary" claims can be awarded more than the cap allows, but only a limited number of claims (up to 3% of compensable cancer claims and up to 1% of compensable asbestosis claims) can be found to be "extraordinary" in any particular year, and the total amount of compensation available to victims with "extraordinary" claims is itself capped. JA 71-75, 82-86.

plaintiffs, who alleged that they had not sustained a physical injury, had failed to allege an "injury in fact" and therefore lacked standing, and (3) the "exposure-only" plaintiffs had not claimed, *in good faith*, a right to recover damages in excess of the jurisdictional minimum specified in 28 U.S.C. § 1332(a).

The objecting class members also argued, *inter alia*, that the proposed settlement did not meet the threshold level of fairness required to present it to the class because (1) approval of the settlement would deny class members due process by resolving their claims before they had accrued, (2) notice to uninjured "future claimants," in any form, of the resolution of claims not yet in existence would be inherently inadequate and would not provide them with a meaningful opportunity to opt out of the class as required by Rule 23(b)(3) and the Due Process Clause, and (3) the class as defined could not properly be certified under Rules 23(a) and (b). Public interest groups, victims organizations, labor unions, other former manufacturers of asbestos-containing products, and two states appeared as amici curiae in order to join in the objecting class members' jurisdictional and/or threshold fairness objections.

In separate briefs, the objecting class members challenged the notice plan proposed by the settling parties. The objectors argued, *inter alia*, that the notice plan was not reasonably calculated to deliver individual notice to the millions of class members whose identities could be readily ascertained, and thus did not comply with Rule 23(c)(2) and the Due Process Clause. The objectors also reiterated their contention that no form of notice would be effective as a practical matter, and therefore constitutionally adequate, to alert class members who have no current injury or grievance that their future claims were being compromised in the class action.

On October 6, 1993, the district court issued a memorandum order overruling the objections to the court's exercise of subject matter jurisdiction over the class action. JA 183. Three weeks later, the court approved, with some minor modifications, the notice plan proposed by the settling parties. JA 282. The court

rejected the objectors' contention that the plan did not provide enough class members (particularly those who could be easily and readily identified) with individual notice about the class action, stating that further efforts to identify class members would be "unduly time-consuming and expensive, and not necessarily fruitful." JA 297. The court also rejected the objectors' contention that any notice, however delivered and in whatever form, would not provide presently uninjured class members with constitutionally adequate notice and a meaningful opportunity to opt out. JA 311-14.

The district court subsequently ruled that the settlement was fair and tentatively approved it. Cert. App. 88a-276a. On Sept. 21, 1994, the court entered a preliminary injunction prohibiting class members from initiating or maintaining asbestos-related claims against the CCR defendants except through the settlement. Cert. App. 67a-87a.

5. Respondent Casimir Balonis. Class member Casimir Balonis was exposed to asbestos when he worked briefly in a shipyard from 1947-48. He was in excellent health until being diagnosed with mesothelioma in May 1994, months after the opt-out period closed on January 24, 1994. On December 2, 1994, Mr. Balonis and his wife sued various asbestos makers in a Maryland state court. District Ct. Findings of Fact and Conclusions of Law, Slip op. of July 11, 1995, at 6. On April 10, 1995, some of those defendants indicated that they would name two CCR members as third party defendants, and on the same day the Balonises amended their complaint to include those CCR companies. The next day, CCR contacted the Balonises' counsel and informed him that he and his clients were in violation of the preliminary injunction because Balonis was a member of the class and had not opted out of the class settlement. Slip op. at 6-7.[2]

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[2] Although the district court's injunction precludes injured persons from suing CCR members, it does not restrict defendants from filing third-party claims against CCR companies. For Balonis, this meant that the existing defendants could defend at trial by arguing that Balonis's exposure to CCR

The Balonises moved in the the district court on April 27, 1995 to have the injunction lifted. They argued that under the settlement they would have to settle their case against CCR for between $37,000 and $60,000, as set out in the compensation schedule. They noted that, in contrast, mesothelioma cases in Baltimore courts tried to a verdict render judgments from $1 million-$9 million, with a majority of verdicts between $2 million and $4 million. *Id.* at 10.

On July 11, 1995, the district court issued an order citing the Balonis plaintiffs and their attorney for civil contempt, ordering them to cease prosecution of the Maryland state court action against CCR, and directing CCR to file, for the court's consideration, a motion for costs and attorneys' fees. The court held, citing its prior rulings, that it had subject-matter jurisdiction over the class action and that it possessed personal jurisdiction over the Balonises because they were part of a class that had been the subject of a notice campaign and because they had been adequately represented and had a chance to opt out. Slip op. at 11-12. In fact, it is undisputed that Mr. Balonis had been occupationally exposed to asbestos only briefly, for less than two years half a century ago, and had received no notice of this class action. The district court made no contrary findings, but simply held that respondents' individual circumstances did not change the court's notice and other rulings with respect to the class. *Id.*

In the same opinion, the district court denied the Balonises' motion to lift the injunction as an improper attempt to relitigate matters the court had already adjudicated. Slip op. at 18-19. The court explained that, if it granted relief to the Balonises, whose "situation is not unique," it would "lead to the disintegration of the *Georgine* settlement." *Id.* at 22 & n.13.

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products rather than their own was responsible for his disease. Plaintiff, enjoined from proceeding against CCR defendants, would be in a lose-lose situation.

Casimir Balonis died of mesothelioma on October 24, 1996. His wife continues his struggle to obtain a day in court in their state law tort action against the petitioners.

6. The Court of Appeals' decision. On appeal of the district court's decision of Sept. 21, 1994 imposing a preliminary injunction on collateral litigation by class members, Cert. App. 67a-87a, the Court of Appeals unanimously reversed. The Third Circuit vacated the injunction, and remanded the case to the district court with instructions to decertify the class. The court expressed "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction," but elected to pretermit these issues because it deemed the class certification question dispositive. Cert. App. 19a.

The Third Circuit held that the class could not meet the Rule 23(a) requirements of typicality and adequacy of representation, or the Rule 23(b)(3) requirements of predominance and superiority. Cert. App. 40a-57a. The court explained that "[c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods." *Id.* at 41a. The court concluded that "[t]hese factual differences translate into significant legal differences," so that the typicality and predominance criteria could not be met. *Id.*

Next, the Court of Appeals held that "serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement" of Rule 23(a)(4). App. 49a. "[T]the settlement makes numerous decisions on which the interests of different types of class members are at odds." *Id.* For example, "under the settlement many kinds of claimants (e.g., those with asymptomatic pleural thickening) get no monetary award at all." *Id.* "The settlement makes no provision for medical monitoring or for payment for loss of consortium." *Id.* "The back-end opt out is limited to a few persons per year." *Id.* "The settlement relegates those who are unlucky enough to contract mesothelioma in ten or fifteen years to a modest recovery, whereas the average

recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars." *Id.* Morever, the settlement exacerbates conflicts between currently injured and "futures" plaintiffs:

> [T]hose who are not yet injured would want reduced current payouts (through caps on compensation awards and limits on the number of claims that can be paid each year). The futures plaintiffs should also be interested in protection against inflation, in not having preset limits on how many cases can be handled, and in limiting the ability of defendant companies to exit the settlement. Moreover, in terms of the structure of the alternative dispute resolution mechanism established by the settlement, they should desire causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993. Finally, because of the difficulty in forecasting what their futures hold, they would probably desire a delayed opt out. ...

Id. at 50a. On each of these points, the interests of "exposure-only" plaintiff class members were diametrically opposed to those of currently injured class members.

Further, the court found that Rule 23(b)(3)'s requirement that the class action be "superior to other available methods for the fair and efficient adjudication of the controversy" was not satisfied in part because the "[p]roblems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be *insurmountable*." Cert. App. at 55a (emphasis added). Because asbestos-related illnesses like mesothelioma may be caused by slight and incidental exposure to asbestos, many currently uninjured class members (especially spouses and children) may not know that they have been exposed to asbestos within the terms of the class definition. *Id.* at 55a. Even if they know of their exposure, the court added, such as-yet uninjured class members "may pay little attention to class action announcements" and are "unlikely to be on notice that they can

give up causes of action that have not yet accrued." *Id.* And even if those currently uninjured class members find out about the class action and realize that they fall within the class definition, the court noted, "they may lack adequate information to properly evaluate whether to opt out of the settlement." *Id.* at 56a.

In a concurring opinion, Judge Wellford "fully subscribe[d]" to the panel's decision "that the plaintiffs in this case have not met the requirements of Rule 23," App. 60a, but wrote separately to make clear his view that the exposure-only class members had no standing to sue and could not be bound by the class action judgment *Id.* at 66a.

SUMMARY OF ARGUMENT

I. This case compels the Court to choose between approving an expedient solution to what is perceived as a major social problem on the one hand, and preserving its institutional values on the other. Although Congress has not responded to the call for a legislatively created nationwide asbestos claims compensation scheme, the petitioners and their hand-picked class counsel have taken it upon themselves to draft their own legislative solution and to submit it to the federal judiciary. The real threat to the courts and to the law is not the burden of asbestos litigation, which will pass, but the corruption of the class action process that petitioners offer as the cure for crowded dockets. Petitioners would collapse the carefully crafted safeguards of Rule 23(a) and (b) into the fairness inquiry of Rule 23(e), so that certification under Rule 23 would be possible even when the class "members" are an assortment of unrelated persons with no common interests or similarities apart from the obviously shared goal of maximizing the *aggregate* value of any proposed settlement. Defendants could thus replace the otherwise applicable law of 50 states with a new system of "law" scripted by the defendants and "enacted" by judicial decree as part of a friendly lawsuit before a federal court.

II. Petitioners' proposal for using settlements to cure defects that would otherwise prevent class certification creates perverse incentives that would deprive absent class members of due process. Absent class members are non-parties who may be represented and bound by class counsel and the class plaintiffs only if the certification standards of Rule 23 — which ensure due process — are met. Petitioners' proposal to read Rule 23 to permit class representatives, class counsel and defendants to manufacture "common" questions and other certification prerequisites by stipulating to a settlement in a case that they admit could not otherwise be certified would dilute the due process safeguards for virtual representation.

When putative class counsel cannot secure class certification without the defendants' help, class counsel lose all leverage over the defendants. Since the plaintiffs' attorney can earn a fee off the absent plaintiffs' claims only if there is a class action, and there can be a class action only if the defendants want one, rather than being adverse to the defendants the putative class counsel becomes *dependent* on them The Due Process Clause forbids representatives whose incentives are so deficient from binding a group of absent plaintiffs who wish to speak for themselves. *Hansberry v. Lee*, 311 U.S. 32 (1940); *Martin v. Wilks*, 490 U.S. 755 (1989).

III. Another unprecedented feature of this case is its extinguishment of *future* claims held by people who do not know that they have been exposed to asbestos or that they are members of the class. The meaningful notice and opt-out opportunity required by due process and Rule 23 cannot be provided to such absent class members who may currently be unaware that they have a claim or whose claim may not yet have come into existence. To ask a potential future asbestos victim to evaluate the trade-offs in a proposed settlement before she ever develops an injury and a related claim is to demand that she gaze into a crystal ball while wearing a blindfold. When there is no limited fund mandating resolution of potential future claims *now*, no class member should be forced to accept such a caricature of due

process. And even if meaningful notice could theoretically be provided to such future claimants, the notice campaign in this case was wholly inadequate.

IV. Policy concerns also militate against the petitioners' proposed interpretation of Rule 23. Lower certification standards for settlement class actions are not necessary to deal with the docket burden of asbestos litigation. According to both the district judge in charge of it and other asbestos defendants, the Multi-District Litigation process has been successful in dramatically reducing the federal asbestos caseload. Moreover, the Third Circuit expressly approved the use of settlement classes and therefore settlement classes that comply with the rigorous requirements of Rule 23 are still a viable tool of case management. Petitioners' appeals to expedience could not in any event justify overriding the limits of Article III and Rule 23.

V. Petitioners' construction of Rule 23 is wholly inconsistent with the history of class action practice. The drafters of the 1966 Amendments warned that Rule 23(b)(3) should not be used to certify mass tort class actions even for actual litigation, and there is nothing to indicate that the Rule was designed to allow certification (for settlement only) of classes of potential future claimants so that the federal courts can "adjudicate" "cases" that are not triable in those courts.

VI. Finally, at the very least the injunction against collateral attacks on the settlement must be vacated. The district court improperly enjoined class members from suing in any other court, thereby eliminating the due process right to pursue a collateral attack on a class action in which the absent plaintiffs received inadequate representation or were not subject to the court's jurisdiction. A court may not attempt to predetermine the res judicata effect of its own judgment. *Hansberry v. Lee*, 311 U.S. 32 (1940).

ARGUMENT

I. THIS UNPRECEDENTED CLASS ACTION REPRESENTS A DANGEROUS CORRUPTION OF RULE 23

Petitioners invoke the unpublished report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation as authority for the wisdom and permissibility of their future-claims class action. Pet.Br. 6, 49. Petitioners contend that they took their mission statement from the Ad Hoc Committee: to go forth and achieve a global settlement of all possible future asbestos litigation by means of a settlement class action. They contend that the "settlement terms establish the kind of claims resolution system envisioned by the Ad Hoc Committee." Pet.Br. 6. Insisting that what they have brought to the federal judiciary is precisely what it asked for in the Committee's Report, the petitioners now act miffed that the Third Circuit has, ungratefully, disavowed petitioners' quest and decertified their class action.

Petitioners' invocation of the Ad Hoc Committee Report is disingenuous — at best. As explained above, the Committee's unanimous recommendation was to urge *legislative* creation of a national *administrative* dispute resolution system. Report of the Ad Hoc Comm. at 3, 27, 42. See pages 1-2, *supra*. The Committee noted enormous federalism problems posed by the need to override state law and recognized that expanded use of class actions could not resolve the asbestos problem without legislative changes by Congress: "virtually all of the issues relating to a so-called 'national solution' are primarily matters of policy for Congress," Ad Hoc Comm. Rep. at 3. "In the final analysis," the Committee "concluded that congressional action is necessary to enable the courts to meet the unique problems presented by asbestos litigation." *Id.* at 26. Contrary to petitioners' intimations — and according to the petitioners' own witness — the Committee never considered and never recommended the

possibility of addressing the asbestos problem through settlement class actions. See page 3, *supra*.

Although Congress has not responded to the Ad Hoc Committee's call for legislative action, the petitioners have taken it upon themselves to draft their own legislative solution and to submit it to the federal judiciary. Apparently all large, white, marble buildings in Washington, D.C. look the same to petitioners. But this proposal for creation of a legislative dispute resolution scheme, whatever its merits, belongs not in this building but in the one across the street with the dome. As the Third Circuit recognized, this case compels this Court "to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other." Cert.App. 17a. "[W]hat the district court did here might be ordered by a legislature, but should not have been ordered by a court." Cert.App. 59a. The decision below must be affirmed if the Court is to "avoid a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it lacks." Cert.App. 20a. The courts must "leave legislative solutions to legislative channels." *Id.*

Perhaps the greatest irony is that petitioners' "reforming" zeal is so misplaced. The real threat to the courts and to tort law is not the burden of asbestos litigation, which will pass, but the corruption of the class action process that petitioners offer as the cure for crowded dockets. Every month seems to bring new reports of abuses in class action settlements. The lawyers for both parties profit, wrongdoers make sweetheart deals to dispose of substantial liabilities at bargain-basement rates — but innocent victims end up with pennies on the dollar as compensation for their alleged injuries.[3]

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[3] *See, e.g., In re Ford Motor Co. Bronco II Prods. Liab. Litigation* 1995 U.S. Dist. LEXIS 3507, at 28-29, 32 (E.D. La., Mar. 15, 1995) (rejecting proposed settlement of multidistrict litigation, noting that "[n]ot only are the terms of the proposed settlement inadequate, but there is evidence that class

Petitioners' proposal would only accelerate that depressing

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counsel's representation was also inadequate" and that the proposed settlement "could possibly be the result of collusion between the defendant and class counsel"); R. POSNER, AN ECONOMIC ANALYSIS OF LAW 570 (4th ed. 1992) (no one has stake in size of class action judgment except defendant, who has interest in minimizing it; class counsel will be tempted to offer to settle with defendant for small judgment and large fee; and lawyers largely control access to information by court, which is charged with approving settlement); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995);John C. Coffee, *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995); Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 813 (1995); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995); Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 13 (1995); Leubsdorf, *Co-opting the Class Action*, 80 CORNELL L. REV. 1222, 1225 (1995); Richard Marcus, *They Can't Do That, Can They?: Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995); Eichenwald, *Class-Action Suite Deadline Expired, Prudential Argues*, N.Y. TIMES, Dec. 11, 1995, at D2; Eichenwald, *Lawyers Receiving $22.6 Million of Prudential Settlement*, N.Y. TIMES, May 20, 1994, at D2; Eichenwald, *Millions for Us. Pennies for You*, N.Y. TIMES, Dec. 19, 1993 at § 3, 1; Leer, *Thanks to Lawyers, I'm 93 Cents Richer*, SAN DIEGO UNION-TRIBUNE, July 14, 1996 at G3; Meier, *Math of a Class-Action Suit: "Winning" $2.19 Costs $91.33*, N.Y. TIMES, Nov. 21, 1995, at A1; Meier, *Fistfuls of Coupons*, N.Y. TIMES, May 26, 1995, at D1; Paltrow, *Lawyers to Get 25% of Prudential Class-Action Settlement; Securities: Judge Apparently Ignores Complaints from SEC and California Officials that the Fee Requests Were Excessive*, L.A. TIMES, May 20, 1994, at D1; Phelps, *Attorneys Who Get Paid in Cash Irk Clients Who Get Paid in Scrip*, STAR TRIBUNE, April 17, 1994 at 4D; Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST. J., July 18, 1996, at A1; Schonbrun, *How Public Can Stop Class-Action Racket*, S.F. CHRON., Oct. 18, 1993, at B3; Walt, *Truck Lawsuit Shifts into Reverse: Attorney Fees Issues Cited in Ruling*, THE HOUSTON CHRONICLE, Feb. 10, 1996, at Business, 1; Walker, *Class-Action Suits Overdue for Fee Reform*, SACRAMENTO BEE, June 6, 1993, at B7; Weinstein, *Class Action Filings: Often are Lawsuit Abuse*, DALLAS MORNING NEWS,July 28, 1996 at 61.

trend. Petitioners would reinterpret Fed. R. Civ. P. 23 so that actions which could never be certified for trial in federal court could nonetheless be *settled* there. Under petitioner's proposal, the federal judicial power would be used to enforce the resulting settlement agreements and to extinguish the claims of absent class members. This proposal will likely lead to a proliferation of sham settlements and to the continued erosion of public respect for the American judicial system.

Petitioners would replace the carefully crafted Rule 23 criteria with the single "fairness" inquiry of Rule 23(e). In the petitioners' own words, once the parties have jointly proposed a settlement of a non-triable case, "[t]he legal and factual questions that remain . . . relate[] solely to the fairness of the settlement." Pet. Br. 42. Thus, certification under Rule 23 is possible even when the class "members" are an assortment of unrelated persons with no common interests or similarities apart from a shared goal (manufactured by the settling parties) in maximizing the value of the settlement.

Under the petitioners' view, virtually any tortfeasor could use a settlement class action pre-emptively to extinguish the rights of injured consumers nationwide to pursue judicial remedies. A tobacco manufacturer could seek out a compliant plaintiffs' attorney to orchestrate a nationwide class "action" on behalf of all smokers and those exposed to second-hand smoke who have not yet brought suit — and even on behalf of those who have not yet been injured by that exposure. Price-fixers, securities laws violators, and fraudsters could use the same strategy to extinguish the legal rights of their victims before they have brought suit. Doctors, hospitals and HMO's could do the same for victims of medical malpractice who have not yet filed claims.

Such hypotheticals are hardly far-fetched in the present circumstances. Before the district court decision below, no court had ever approved a class action like the one in this case, where:

- The class counsel of the plaintiff class was hand-picked by their adversaries and invited to negotiate a settlement for an action that would then be brought.
- The parties conceded on the record that they had no intent to litigate the case, but only to settle it.
- The settlement includes "futures" claims that have not yet accrued, so that their unwitting holders have their causes of action extinguished or compromised without any meaningful chance to protect themselves.
- The class is rife with conflicts of interest.
- The settlement provides that large groups of class members will receive nothing at all for their claims, even though such claims are routinely compensated in the tort system. Meanwhile, the lawyers who claim to represent the class had clients with similar claims, who were automatically opted out of the class and permitted to settle in a simultaneous side deal on terms markedly superior to those applicable to class members.

In short, this case is itself part of the parade of horribles. If a class action is permissible here, it is difficult to identify any logical stopping point to petitioners' theory. Defendants could shut off access to the judicial system, substituting claims processing regimes that they control and promulgating compensation schedules that provide only a fraction of the damages available in the tort system. Defendants could replace otherwise applicable state law with a new system of "law" scripted by the defendants and "enacted" into law by judicial decree as part of a friendly lawsuit before a federal court understandably appreciative of docket-clearing measures. Such wholesale displacement of state law by the federal courts is of course in stark violation of the principles of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Moreover, petitioners' approach is a dangerous one-way ratchet. Petitioners posit that few if any mass tort class actions are litigable, Pet. Br. 37, but that all may be certified for settlement when the defendant consents. Defendants, in other

words, are masters of the Rule, defeating mass-tort class actions when they wish to and employing them, as here, when they have hand-picked the class counsel and devised a settlement to their liking.

The institutional harm threatened by petitioners' proposal is incalculable, and it is not limited to the *Erie* principle. Petitioners' insistence that the underlying dispute need not be triable in order to permit the resulting settlement to be entered pursuant to Rule 23 would transform the federal courts into mediation forums and utterly obliterate the distinction between nonjusticiable disputes over legislative proposals and judicial "cases" and "controversies." It would corrupt Rule 23 and spawn even more highly suspicious class action settlements between well-remunerated attorneys willing to sell out the public interest. And en route to that destination, petitioners' revision of Rule 23 and relaxation of Article III justiciability requirements would open the federal courts to a tidal wave of damages lawsuits, both individual and class action, brought by plaintiffs who have only conjectural "future injuries."

II. PETITIONERS' PROPOSAL FOR USING SETTLEMENTS TO CURE DEFECTS IN CLASS CERTIFICATION WOULD CREATE PERVERSE INCENTIVE STRUCTURES THAT WOULD DEPRIVE ABSENT CLASS MEMBERS OF DUE PROCESS.

If this Court were to accept petitioners' position that judges should permit features of a settlement to cure defects in representation, commonality, typicality and the like that an objecting defendant could have invoked (on behalf of the absent plaintiffs, no less) to prevent class certification, the Court would be putting absent class members at the mercy of named plaintiffs, their attorneys, and defendants, whose ability to extinguish their rights via inadequate and even collusive settlements would be virtually unbridled. Settlement sell-outs would be encouraged. Plaintiffs' class counsel would lack incentives to maximize the

value of absent plaintiffs' claims, because named plaintiffs would fail to speak for absent plaintiffs' diverse interests as they should, and because defendants would benefit by paying less than absent plaintiffs' claims are worth. Absent class members would thus be bound without due process of law in violation of *Hansberry v. Lee*, 311 U.S. 32 (1940), and its progeny.

The only true parties to a class action are the named plaintiffs and the named defendants. Absent class members such as respondent Balonis are just that — *absent* members, not actual parties. They are emphatically *non*-parties whose interests are virtually represented by others acting under authority of the federal rules. *See, e.g., Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir., 1996) (Easterbrook, J., joined by Posner, C.J., and Manion, Rovner, and Wood, J.J., dissenting from denial of rehearing en banc) ("Absent class members are represented by the named plaintiffs and their lawyers, but they aren't parties").

It must be borne in mind that "virtual" representation, like "virtual" reality, is a simulated world, an artificial construct. The legitimacy of this fictional world depends on rigorous compliance with the rules of the simulation. Respondent Balonis hired his own lawyer; he did not authorize class counsel to safeguard his interests. The named class plaintiffs gain the power to represent and bind absent plaintiffs such as Mr. and Mrs. Balonis only by satisfying the requirements of Rule 23, which implements the Due Process Clause. And that is what class certification is all about. It determines whether a named plaintiff and his attorney can make decisions for a group of absent plaintiffs. When class certification is granted, a class representative and class counsel are thereby empowered to bind the absent class members to their conduct and resolution of a class lawsuit. Rule 23 thus creates and regulates a relationship in law between a named plaintiff and an attorney on the one hand, and a group of absent plaintiffs on the other. It expressly authorizes the former to speak and act for the latter "only if" *all* the requirements of Rule 23(a) and (b)(3) are met:

typicality, commonality, predominance, superiority and adequacy of representation.

Neither a class representative nor his class counsel is empowered to waive the requirements of Rule 23. Permitting such waiver would allow absent plaintiffs to be drafted into the class action for the convenience or ends of the class plaintiffs and their attorneys. It would be an even more suspect outrage to permit a class representative, putative class counsel, and the defendant to jointly accomplish a waiver of any Rule 23 requirement by acting together. Rule 23 does not grant any power over absent class members to the defendants with whom class plaintiffs and class counsel may choose to deal.

Petitioners' proposal to read Rule 23 to permit class representatives, class counsel and defendants to manufacture "common" questions and other certification prerequisites would in effect allow them to relax the requirements of Rule 23 by agreement. This would eviscerate the limitations on virtual representation written into Rule 23. If a named plaintiff were atypical, the atypical named plaintiff and the defendant could paper over the atypicality by forging a settlement in which all appear to have an identical stake. If the requirements of commonality, predominance, and superiority were not met, a class representative, class counsel and the defendant could meet these requirements by stipulating to a settlement in which these failures are rendered invisible to the judicial eye. If a named plaintiff or her counsel suffered a conflict of interests and could not adequately represent the class, that difficulty too could be erased.

Petitioners' argument that judges should allow the terms of a settlement to fulfill the class certification requirements is nothing more than a camouflaged version of the claim that class representatives and defendants may work together to waive the requirements of Rule 23.

Petitioners' repeated chant that the Third Circuit class certification analysis compels judges to decide hypothetical questions and to ignore facts is captious. The legitimacy and concreteness of an objection to certification depends on the nature

of the objection, not on who raises it or when it is raised. When an absent class member objects that the named plaintiff is not typical or that the predominance requirement is not met, the district court decides the same question that a defendant challenging certification might have raised, does so on the basis of the same evidence, and reaches an equally concrete conclusion. The inquiry is not the least bit hypothetical.[4] If anything, objections to certification raised by absent class members are *more* appropriate for judicial resolution than defendants' objections, since it is the virtual representation of those class members that is at stake.

The danger absent plaintiffs are most likely to complain about (and the objection raised here by Balonis and the other respondents) is that the actual parties (the named plaintiffs, their lawyers, and the defendants) are working together against the non-parties (the absent class members). This same danger existed in *Martin v. Wilks*, 490 U.S. 755 (1989), where the true parties in litigation attempted to use a settlement to purloin a benefit from unrepresented third parties and secure it for themselves. This Court permitted the third parties to attack the consent judgment, noting that their interests would be threatened if the named parties, whose interests conflicted with theirs, were permitted to bind them without their consent. *Martin*, 490 U.S. at 768. *See*

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[4] Given petitioners' proposal to allow federal judges to premise certification decisions on settlement agreements that contradict actual litigation facts, it is remarkable that they denounce the Third Circuit for requiring judges to perform a hypothetical inquiry (psychiatrists generally refer to this phenomenon as "projection"). A false or deficient assertion about class certification does not become true or sufficient simply because class counsel, the class representatives and the defendants agree upon it. Thus, the assertion that "all class members desire to get money now from a judgment against the defendant," if insufficient to establish commonality, etc. under Rule 23 to begin with, does not become sufficient by virtue of being incorporated into a settlement agreement. Although petitioners (and the class counsel they hired) accuse the Third Circuit of ignoring the facts, it is they who do so.

also Local No. 93, International Ass'n Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986).

The danger here is the same. Once a class is properly certified, there is reason to hope that the named plaintiffs and their attorneys will adequately represent the absent plaintiffs. But before certification, and especially when absent plaintiffs object to certification, there is a classic trilateral dispute in which the interests of the named plaintiffs, their attorneys, and the settling defendants conflict with those of the absent plaintiffs — and there is a palpable danger that the former will seek to profit at the latter's expense.

Permitting certification of claims for settlement that could never be tried as a class action creates economic incentives for class counsel to settle absent plaintiffs' claims too cheaply. When the Rule 23 requirements are met for trial purposes, class counsel has a powerful form of leverage in settlement negotiations: a credible threat to stick a defendant with an adverse class-wide judgment, and a fee-related interest in trying the lawsuit unless the defendant offers its expected value in settlement. The threat is a club. The desire for the largest possible recovery yielding the largest possible fee award is the incentive to wield that club. But this form of leverage disappears when, as the settling parties have formally conceded here, the Rule 23 requirements can be met only through settlement. In that instance, class counsel cannot credibly threaten an adverse class-wide judgment because the lawsuit cannot be tried as a class. Likewise, class counsel has no incentive to take the case to trial because a trial will predictably yield nothing in fees. This is especially true when the only claims alleged in the complaint are "exposure-only" claims so worthless by themselves that class counsel has never previously made them in a lawsuit and the CCR defendants have never paid them. JA 448. A plaintiffs' attorney who can obtain class certification *only* if the defendant agrees to a settlement on which certification can supposedly be predicated is a hired gun whose revolver is empty.

But a plaintiffs' attorney who has no leverage over the defendant does pose a very real threat to one group — the absent

class members who are supposed to be his clients. These perverse economic incentives flow naturally and inevitably from the vision of Rule 23 urged by petitioners. Suppose that a lawyer representing a tort victim files a class action on behalf of a hundred other victims and that the Rule 23 requirements can be met only if the defendant agrees to settle the lawsuit as a class. If the defendant makes a low-ball offer to settle the class action the attorney may well be inclined to accept it, for unless there is a class settlement that lawyer will earn only the contingent fee in his original single case. Normal economic self-interest would therefore lead the attorney to view the low-ball offer favorably, even if it settles the plaintiffs' claims for pennies on the dollar.

One might think that the plaintiffs' lawyer would hold out for more money because the fee would be even larger if the class were to receive more than the low-ball offer. Although it is true that the attorney would prefer more money to less, the problem is that the class counsel cannot extract more money from the defendant because she has no settlement leverage. The class attorney cannot threaten the defendant with a huge class-wide judgment because the lawsuit cannot be tried as a class. Her only threat is that the individual lawsuits will proceed to trial unless the case settles as a class action, but that is no threat with respect to the exposure-only claims here, which the class plaintiffs concede they never had any intention to pursue outside a class action. Cert.App. 62a-66a. Moreover, other potential plaintiffs' class counsel will be waiting in the wings to rush in if the first plaintiffs' attorney offered the settlement class action deal turns it down. The defendant can shop it to the other prospective class counsel until someone buys it. As the testimony of CCR's own officers in this case shows, a defendant is unlikely to have to "shop" for very long to get the desired bargain. JA 427, 626 (present class counsel were the very first plaintiffs' attorneys "approached" and "picked" by the CCR defendants to bring this settlement class action).

One might also suppose that the defendant's low-ball strategy would fail because absent class members would simply opt out of

an inadequate settlement. But the right to opt out is an effective safeguard only for those class members who learn of the proposed settlement and grasp its significance in time to exclude themselves. Due to the inherent defects in a notice campaign directed at people who aren't injured yet and may not even know that they have been exposed to asbestos and are therefore class members, let alone the particular defects in the notice campaign here, this safeguard was meaningless in this case, as demonstrated *infra*.

Although they are nominally counsel for the entire plaintiff class, including the absent class members, attorneys for the class representatives share an overriding interest with the defendants when, as here, they cannot secure class certification without the defendants' help. The attorneys can earn a fee off the absent plaintiffs' claims only if there is a class action, and there can be a class action only if the defendants want one. Rather than being adverse to the defendants, putative class counsel is *dependent* on them. (This is underscored in the current case by the back-seat that class counsel have consistently taken to the attorneys for CCR: counsel for CCR picked class counsel, designed and ran the notice campaign for class counsel's clients, argued class counsel's case to the Court of Appeals and sought certiorari for the class action that the Third Circuit decertified).

By reversing the Third Circuit, this Court would put its stamp of approval on incentive arrangements that encourage plaintiffs' attorneys and named plaintiffs to sell short the interests of the absent class members they are supposed to be "virtually" representing. Only when certification can be obtained without a defendant's help can class counsel be expected to demand in settlement every dollar the absent plaintiffs' claims are worth. Only when important divergent interests within the absent class are given separate voices are settlement proceeds likely to be divided appropriately. The approach urged by Petitioners would encourage low-value settlements presided over by attorneys who nominally represent a class but who, in reality, are incapable of dealing with defendants from a position of strength. It would also

encourage settlements that submerge and ignore important differences between absent plaintiffs. The Due Process Clause forbids representatives whose incentives are so demonstrably deficient from binding a group of absent plaintiffs who wish to speak for themselves. That is the lesson and the legacy of *Hansberry v. Lee*.[5]

III. THE NOTICE IN THIS CASE VIOLATED RULE 23(C)(2) AND DUE PROCESS

A. Adequate Notice Is Inherently Impossible In A "Futures" Class Action Of The Kind Involved Here.

Another unprecedented feature of this case is its extinguishment of *future* claims held by persons who often do not know that they have been exposed to asbestos or do not know that they are members of the class. Due process and Rule 23(c)(2) require that notice be tailored to allow an absent class member to "make a rational judgment on whether to exclude himself from the action." 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1787, at 220 (1986). This standard cannot be met here. The MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.45, at 244 (1995), warns that "persons who may not currently be aware that they have a claim or whose claim may not yet have come into existence. . . cannot be given meaningful notice," and their opt-out rights may be "illusory." As the Court of Appeals noted, there are several dimensions to the notice problem.

1. "First, exposure-only plaintiffs may not know that they have been exposed to asbestos within the terms of this class action." Cert. App. 55a. Indeed, respondent Casimir Balonis was exposed to asbestos for about a year when he worked in a

[5]The parallels between the defective incentive structure in this case and that condemned by this Court in *Hansberry v. Lee* are explored in the Brief *Amicus Curiae* of Law Professors in Support of Respondents at 22-25.

shipyard a half-century ago (1947-48), and he did not have any asbestos-related illness until he was diagnosed with mesothelioma several months after the opt-out period closed.

The problem is especially severe with respect to spouses and other family members, whose loss of consortium claims are also extinguished in the settlement. Cert. App. 23a n.3. For example, class representatives LaVerne Winbun and Nafssica Kekrides and class member Margaret Balonis did not learn that their husbands had been occupationally exposed to asbestos until after the men contracted mesothelioma. Cert. App. 55a. In addition, the class contains children not yet born and spouses not yet married, who, needless to say, cannot receive effective notice.

Furthermore, family members are also susceptible to asbestos-related illnesses because of their close proximity to those who were occupationally exposed. Indeed, tragically, the wife of one of the exposure-only class representatives contracted mesothelioma from exposure to the asbestos dust carried home on her husband's work clothes. Fair.Hrng.Trans. at 228-29 (Feb. 24, 1994).

2. Second, the Third Circuit concluded that "class members who know of their exposure but manifest no physical disease may pay little attention to class action announcements." Cert.App. 55a Indeed, Casimir Balonis was in fine health until he was diagnosed with mesothelioma (an always fatal form of cancer) several months after the opt-out period closed. "Without physical injuries, people are unlikely to be on notice that they can give up causes of action that have not yet accrued." *Id.* The manner in which government — let alone ordinary citizens — manages risk has been the target of much scholarly criticism. *E.g.*, Stephen G. Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993); Stephen G. Breyer, REGULATION AND ITS REFORM (1982); John D. Graham & Jonathan B. Wiener, eds., RISK VS. RISK (1995). To expect exposure-only individual class members to read, understand, and respond to densely written class action notices dealing with theoretical legal claims that do not yet exist is nothing short of Panglossian. As the State of

Texas observed in the Court of Appeals, "Many must have treated even individual written notices — if they received any — as junk mail." Br. Amicus Curiae at 3 (filed Feb. 27, 1995).

Indeed, asbestos exposure, even in the worst case, carries with it a relatively low probability of future harm. In the pending case of *Metro-North Commuter R.R. v. Buckley*, No. 96-320, the respondent railroad worker who "ingested a massive amount of carcinogenic asbestos fibers into his lungs" while working underneath Grand Central Station — and who was known as a "Snowman" because "every day after working on the old pipe insulation in the tunnels, [he] would emerge covered head to toe with white pipe insulation dust" — alleges merely that he "now has an increased risk of dying from asbestos-related cancer of between 1% and 5%."[6] The risk is this small even though for three years he was exposed "to massive amounts of carcinogenic fibers on a daily basis."[7] When the risk is a low-level possibility of future harm — perhaps decades away — the fact that most class action notices are ignored should hardly be surprising. The unlucky few who contract mesothelioma and other asbestos-related diseases are struck by lightning; the vast majority of the class will survive unscathed.

3. "Third, even if class members find out about the class action and realize they fall within the class definition, they may lack adequate information to properly evaluate whether to opt out of the settlement." Cert. App. 55a-56a. The settlement covers some but not all the conditions caused by asbestos for which plaintiffs recover damages in the tort system. It contains no inflation adjustment, no provision to account for new medical or scientific knowledge regarding the etiology of disease, and no guarantee that the CCR defendants will even remain in the settlement after ten years. Not knowing what illness they might develop in the future, or what their personal circumstances might

[6] Br. in Opposition in No. 96-320, at 1, 4 (filed Sept. 27, 1996).

[7] *Id.* at 1.

be at that time, the choice of staying in or opting out can be no more reasoned or deliberate than placing a bet at the track on a horse that hasn't been born yet. As the State of Alabama explained in the District Court, "the class members lack any basis for making an informed decision on whether to remain in the litigation. At best, class members could only guess whether the proposed settlement would be beneficial or detrimental to their interests." Br. Amicus Curiae at 4 (filed Apr. 29, 1993).

Accordingly, "[i]n evaluating the fairness and reasonableness of any proposed settlement, the court should make certain ... that the agreement does not impermissibly waive future claims." 7B Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1797.1, at 41-42 (Supp. 1994). The difficulties of analyzing future claims have led many courts to reject the inclusion of future claimants in class actions altogether.[8] Typically, courts have included future

[8] *E.g.*, *Scott v. University of Delaware*, 601 F.2d 76, 89 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979) ("[W]e do not think that future faculty members, whose possible claims are only speculative and can only be formulated in a highly abstract and conclusory fashion, should provide, and possibly be prejudiced by, membership in the class which [the plaintiff] seeks to represent."); *Shults v. Champion Int'l Corp.*, 821 F. Supp. 520, 524 (E.D. Tenn. 1993) ("No settlement that precludes future, unknown causes of action can be considered fair, reasonable, or in the best interests of the class as a whole."), *dismissed*, 35 F.3d 1056 (6th Cir. 1994); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974) (denying Rule 23(b)(3) class certification, in part on the ground that, "because of the nature of the injuries claimed, there may be persons that might neglect to 'opt out' of the class, and then discover some years in the future that they have contracted asbestosis"); *Foster v. Bechtel Power Corp.*, 89 F.R.D. 624, 627 (E.D. Ark. 1981) (ruling that future plaintiffs could not be included in a Rule 23(b)(2) class: "due process considerations ... permeate the decision of whether or not to certify a class"); *Freeman v. Motor Convoy, Inc.*, 68 F.R.D. 196, 200 (N.D. Ga. 1975) (ruling that a class action could not include prospective job applicants and warning that "an overbroad framing of the class may operate to deprive absent members of due process"); Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 COLUM. L. REV. 397, 397 (1985) ("the inclusion of future members in class actions is inconsistent with both the explicit requirements and the theoretical

claimants only in contexts like bankruptcy or other situations where a single *res* must be divided among competing claimants, and "appointing a representative for future claimants best serves the general principles of due process by giving these claimants their day in court. . . . Without allowing representation in the reorganization proceeding, a court may be denying future claimants any remedy at all." Note, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 Vand. L. Rev. 1369, 1393 (1985). Here it is undisputed that there is no limited fund or any other reason that including future claimants in a class action is necessary to protect their interests. Cert.App. 230a ("the assets of the defendants do not constitute a limited fund"). Indeed, the petitioners' own expert witness testified that CCR's maximum total payout under the settlement over the next ten years would constitute less than 1% of the CCR companies' projected gross profits for that same period. Fair.Hrng.Trans. at 88-89 (March 15, 1994).[9]

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underpinnings of Rule 23, thus posing a serious threat to the due process rights of future members"); *id.* at 398 n.7 ("future members cannot be included in (b)(3) actions"); *id.* at 403 ("The drafters of Rule 23 did not anticipate the inclusion of future members in class action suits. Indeed, upon close examination it is clear that Rule 23(a)'s prerequisites for class certification cannot be meaningfully applied to future members to protect their due process rights.").

[9] Nor do cases under other subdivisions of Rule 23(b) justify inadequate notice in the Rule 23(b)(3) context. Where there is no right to opt out, notice to the class exists principally to permit the absent class to present objections, not so that each class member can be given the opportunity to control his or her separate litigation. *See also* 3B MOORE'S FEDERAL PRACTICE ¶ 23.55, at 23-417 (1995) ("in the (b)(3) type of class suit there is no jural relationship between the members. They are legal strangers related only by some common question of law or fact and they have a right to opt out of the class. Mandatory notice under (c)(2) informs them of that right, and satisfies the presumed due process precondition to entering a binding judgment against them"); *Durrett v. John Deere Co.*, 150 F.R.D. 555, 562 (N.D. Tex. 1993) ("Rule 23(b)(3) class members are legal strangers related only by some common questions of law or fact. . . . Class

Even petitioners' own authorities concede that "[f]or class members who cannot currently identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, an opt-out right within a court-designated period of time . . . is of no beneficial use." 1 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 1.23, at 1-55 (3d ed. 1992). "[F]uture claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples." *Id.* at § 17.39 at 17-119. Petitioners' authorities also concede that future claimants

> may not even know that they have a claim, let alone its value, until after a settlement is concluded. As many commentators have noted, future claims class actions raise many vexing problems of effective notice, adequate representation, litigation management, actual or potential conflicts of interest, legal ethics, and claims administration.

Peter Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 966 (1995). Accordingly, Prof. Schuck concludes that settlements involving future claimants must contain a "back-end" opt-out right (*id.* at 967) — so that class members can decide whether to opt out *after* their injury is manifested. The settlement in this case contains no such a provision. Cert. App. 56a n.16.

In *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), the court of appeals agreed with the arguments of current Class Counsel Joseph Rice that it would be "absurd" to require "a person who had no inkling that years in the future he would be killed" to participate in a reorganization proceeding today. *Id.* at 943. In direct contrast to his position as class counsel here, Mr. Rice argued in *Schweitzer*

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members under the other provisions have interests more closely aligned").

that "[a] so-called claimant who has no injury cannot make reasonable choices about his claim, no matter what type of notice is given."[10] It was for these reasons that the court in *In re Amatex Corp.*, 37 B.R. 613 (E.D.Pa. 1983), *rev'd on other grounds*, 755 F.2d 1034 (3d Cir. 1985), concluded that "[n]o genuine or meaningful notice can be given to individuals who cannot know of a future cause of action." *Id.* at 614.

This prospect of the wholesale termination of tort claims before they exist, and before the individuals who hold them are aware of them and can intelligently evaluate and act upon them, is precisely what led to the universal adoption of the "discovery rule" for personal injury litigation.[11] The discovery rule provides that a cause of action accrues and the statute of limitations begins to run on the date a plaintiff discovers, or should have discovered,

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[10] Reply Br. of Plaintiffs/Appellants in *Schweitzer v. Reading Co.*, No. 84-1086 (3d Cir.) at 24 (filed Aug. 31, 1984). Mr. Rice also argued:

> Even if it is somehow accepted that Reading gave notice sufficient to meet due process standards, these employees' claims nonetheless cannot be constitutionally discharged. Before a right can be extinguished, those holding the right must be given a meaningful opportunity to be heard. *E.g., Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Such an opportunity was impossible in the instant case . . . [because], before consummation of the bankruptcy, *none of the plaintiffs were injured. It would have been impossible for any of them to make an informed decision on what he or she might accept as fair compensation for an injury that might occur in the future.* A claimant would be ignorant of the extent of possible future impairment and would have no idea what his future personal circumstances would be.

Br. of Plaintiffs/Appellants in *Schweitzer v. Reading Co.*, No. 84-1086 (3d Cir.) at 32-33 (filed June 29, 1984) (emphasis added).

[11] The discovery rule is now universally applied in asbestos litigation. *See, e.g., Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151 (6th Cir. 1981); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1102 (5th Cir.), *cert. denied*, 419 U.S. 869 (1974).

his injury. As early as 1949, in a case involving a railroad worker who had contracted silicosis, this Court adopted the discovery rule, stating that "'the afflicted employee can be held to be injured only when the accumulated effects of the deleterious substance manifest themselves. . . .'" *Urie v. Thompson*, 337 U.S. 163, 170 (1949). The Court rejected the alternative rule requiring a plaintiff to act on his claim before it accrued:

> It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, [the plaintiff] was charged with knowledge of the slow and tragic disintegration of his lungs; under this view [the plaintiff's] failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded onto his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

Id. at 169. This Court concluded that interpreting the law as compelling such an uninformed and unknowing "waiver" of rights by potential plaintiffs who were not yet injured would make it clear that the plaintiff had been afforded "only a delusive remedy." *Id.*

The illogic of prematurely compelling such waivers of unripe, unaccrued claims was decried thirty years ago by Judge Frank when the Second Circuit refused to apply the discovery rule to Connecticut's statute of limitations:

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before you ever marry or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of logical "axiom," that a statute of limitations does not begin to run against a cause of

> action before that cause of action exists, *i.e.*, before a judicial remedy is available to a plaintiff.

Dincher v. Marlin Fire Arms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting).

It is no answer to say, as the district court did below, that a class member wishing to avoid a "premature decision" about participating in the settlement could simply opt out of the action. JA 314. First, to say that unimpaired claimants who lack sufficient information to make a rational judgment are always free to "maintain the *status quo*" by "opting out" *assumes that they are even aware of the existence of the class action in the first place*. Second, *choice* is the defining characteristic of a Rule 23(b)(3) class and the *raison d'etre* for the notice mandated by Rule 23(c)(2) and the Due Process Clause. The decision whether to opt out or stay in is *irrevocable either way* (once the opt-out period closes). If the proposed settlement is — as the settling parties maintain — a fair bargain, then the choice matters a great deal because class members should accept it. If the bargain is a poor one, choice likewise matters a great deal because they should reject it and opt out.

If the district court's and petitioners' dismissive treatment of the right to an informed choice were the law, a court could *always* defend inadequate notice by telling absent class members: "if the notice doesn't provide you with sufficient information to make a rational judgment, so what — just opt out."

Furthermore, the problem of securing informed, deliberative choice may in fact be *compounded* when a detailed settlement is sent along with notice of the class action. "[A]bsentees tend to lack a real understanding of the actions supposedly pursued in their names" and "where notice of the class action is sent simultaneously with the notice of the settlement itself" — the settlement class paradigm — "the class members are presented with what looks like a fait accompli." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 789 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (internal quotation omitted).

> [T]he mere presentation of the settlement notice with the class notice may pressure even skeptical class members to accept the settlement out of the belief that, unless they are willing to litigate their claims individually — often economically infeasible — they really have no choice.

Id.

B. The Notice Campaign In This Case Was Wholly Inadequate.

Providing the "futures" plaintiffs in this class action with adequate notice would have been impossible even if the notice campaign had been well designed and implemented. But it was not. And petitioners' suggestion that "over six million individuals received actual notice materials" (Pet. Br. 13) (internal quotation marks omitted) is highly misleading, to say the least.

The notice campaign consisted of a television and print campaign and the placement of "clip art" announcements of the settlement in the pages of union-issued journals which are mailed to union members and, in some cases, retirees. Cert. App. 216a, 218a-219a. The district court refused to require the settling parties to obtain lists of the names and addresses of (1) present and former employees of the CCR defendants and their predecessors whose job it was to install, or work around asbestos; (2) present and former employees of naval and commercial shipyards; and (3) present and former employees of major purchasers of asbestos or asbestos-containing products from CCR defendants. JA 296-97. The district court did not believe such measures were required by Rule 23(c)(2), JA 297-98, even though this Court held in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), that "individual notice is not a discretionary consideration to be waived in a particular case," and "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Id.* at 173.

The union clip art did not contain a class opt-out form, even though it would have been feasible to include one. JA 499-500. In fact, *nothing in the union clip art, television ads, or newspaper ads circulated by the notice campaign informed class members that they needed to opt out of the class if they did not want to participate in the class action or be bound by the judgment*. JA 502.

The only way for individuals to learn these critical facts was to obtain a notice packet. Such packets were distributed in two ways: through a number of labor unions, and to callers of a special "1-800" number (which was publicized through union clip art, TV spots, and newspaper ads). Cert. App. 218a-219a. In contrast to petitioners' claim of "six million" notices distributed, in fact the record reveals that only 720,000 notice packets were distributed, Cert. App. 218a-219a — *i.e.*, only 12% of the number claimed by petitioners, and less than 4% of the 21 million American workers who have been occupationally exposed to asbestos. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1323 (5th Cir. 1985)(en banc)(an estimated 21 million Americans have been exposed to asbestos).

These inflated claims are part of a pattern. The settling parties promised the district court that they would distribute notice materials to 56 unions with 9 million members, and they promised to send individual notices to as many of the 9 million as possible. In fact, however, only nine unions distributed notice packets to approximately 400,000 persons —a success rate of less than 5%. JA 498. Moreover, the evidence indicated that many unions lack addresses for retired or laid off workers who have been exposed to asbestos in the past. JA 844.

The "1-800" number saw no better success. Of the approximately 250 million residents of the United States, and the tens of millions who have been exposed to asbestos, only 347,146 persons called the 800 number. JA 493. Only 4,223 persons requested copies of the settlement stipulation and only 320,854 requested notice packages. JA 493-94. Some callers to the "1-800" number were incorrectly told that if they did not wish to be

bound by the class action, they did not need to take any further action and were also given inaccurate information about the attorneys fees in the case. Cert. App. 220a.

Further, the notice campaign was delayed, with the result that the number of persons who could successfully opt out was minimized. The union magazines and newsletters containing the settling parties' clip art were not sent out until December 1993 (JA 505) — in some instances as late as December 20. JA 522. The magazines and newsletters were sent bulk rate, which typically takes no less than two weeks' delivery time. JA 505-06. Moreover, they were sent at the height of the holiday season, when mail delivery is especially slow.

Thus, a union member had to:

- receive the magazine by bulk mail;
- read and understand the small ad;
- request a notice packet from the "1-800" number (not surprisingly, in view of the tardy publication date, about 300,000 of the calls on the "1-800" number were made after December 2, 1993, and about 260,000 of the requests for packages came after that date, JA 497);
- receive the packet in the mail (after a call was received, the requested materials were not sent out for between five and ten business days, JA 494);
- read and comprehend the 41-page notice packet (JA 227-81); and
- mail the opt-out form to the district court by January 24, 1994. JA 496.

It is quite likely that a large number of persons requesting notice packages did not actually receive them until after the opt-out date had passed. Amazingly, the settling parties did not inform callers to the "1-800" number of the risk that they might receive their package close to or after the opt-out date. JA 496. The settling parties were receiving calls on the "1-800" number more than a year after the close of the opt out period. JA 504.

The inadequacies of the notice campaign were confirmed by the fact that *six of the seven class representatives who testified on notice issues stated that they saw neither the print nor the television media notices*. *E.g.*, JA 362 (Timothy Murphy, who watches television and reads the newspapers "every day," saw nothing about the class action); JA 369; JA 390; JA 397; JA 420-21, 693; JA 353. The *only* class representative to have seen or read any of the court-approved publications, advertisements, or the notice packet itself was the lead plaintiff, Robert Georgine, who, as president of the AFL-CIO's Building Trades Department, is far more knowledgeable about asbestos disease and legal matters than most class members.[12]

The string of deficiencies is not surprising in light of the manner in which the notice campaign was administered. It was directed by a consultant who had never before handled notice in a class action. JA 484. No one at her firm had any prior experience with class actions. *Id.* Nor did she consult with anyone with prior experience. JA 486. She did not understand that the number of potential class members might be more than 20 million. JA 487. In fact, she had no targeted number at all. JA 488. She made no effort to contact anyone at the hundreds of job sites where large numbers of asbestos claims had come in. *Id.* She could not recall ever meeting with class counsel regarding the notice campaign. JA 490. Class counsel — the guardians of the thousands of class members who will die in the future from asbestos exposure — never gave her lists of groups to contact; never gave her specified job sites where she might locate victims; and never gave her *any* input about how the notice campaign should operate. JA 492.

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[12] The Director of the Office of Workers' Compensation Programs of the U.S. Department of Labor argued below that the notice was "materially defective and incorrect" because it did not provide an acceptable explanation of rights under the Longshore and Harbor Workers' Act. Mem. in Support of Motion for Leave to File Objections to Settlement as *Amicus Curiae* in Dist. Ct. at 1 (Feb. 9, 1994).

Given the circumstances of this "futures" class action, adequate notice would have been inherently impossible, even if the notice campaign had been administered properly. But the notice program here was executed in such a woefully defective manner that the question is not even close.

IV. POLICY CONCERNS ALSO MILITATE AGAINST PETITIONERS' CONSTRUCTION OF RULE 23

The purpose of Rule 23 is not, as petitioners would have it, "efficiency" at all costs. Pet. Br. 30, 33-34, 48. Rather, the principal purpose of the Rule, particularly the Rule 23(a) and (b)(3) criteria, is protection of absent class members, by allowing their claims to be adjudicated only when their interests are aligned with those of the class representatives, and forbidding resolution of claims *en masse* when those interests diverge.

Further, it must not be forgotten that the flood of asbestos lawsuits — if such a flood exists — was created by the callous and often deliberate actions of the asbestos industry, whose misconduct caused unparalleled death and disease. The deaths and injuries of tens, if not hundreds, of thousands of Americans are attributable to asbestos. Innocent future victims will likewise suffer enough for the petitioners' wrongs, and should not be called upon for further sacrifices, including the forfeiture of their constitutional rights.

1. In any event, petitioners' professed policy concerns have no basis. Although their warnings of docket collapse from asbestos litigation may sound familiar enough to pass as conventional wisdom, in fact those claims are currently the subject of intense controversy among judges, academics, and legislators. *See, e.g.*, John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1364 (1995); John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 996, 1010-12 (1995). Indeed, these very same petitioners (in their collective voice as the Center for Claims Resolution) severely criticized what they saw

as the alarmism of the Ad Hoc Committee's 1991 report (a report petitioners now purport to embrace). Petitioners issued a "white paper" response to the Committee Report, arguing: (1) that "claims for significant [asbestos] impairment" are in fact "on the decline, due to lowered workplace exposure levels in the past few decades" (JA 432); (2) that any surges in federal asbestos filings are largely attributable to the publicity surrounding "radical consolidation or class action techniques" promoted by particular federal judges, which attract lower-value claims that might otherwise never be filed (JA 433); and (3) that proposals for mass class actions or consolidations could not be achieved under current law, would exceed the courts' legitimate authority, and would violate the separation of powers. JA 430-31, 437-44.

Even the authorities cited by petitioners maintain that asbestos cases are increasingly "mature" torts, and that, because the initial period of litigation has already established the parameters of liability and fixed the likely recovery values, the claims will increasingly be resolved through consensual settlements on a case-by-case basis. Roger Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 78-79. In fact, petitioners informed the district court that they *settle 99.8% of the asbestos cases filed against them* (JA 125 n.18), and this figure does not even include the mass inventory settlements of close to 23,000 cases that petitioners have been able to negotiate, such as the thousands of pending claims that the petitioners settled in one stroke with class counsel on the eve of the filing of this class action.

We must keep in mind that this settlement class action involves possible *future* claims, and therefore has nothing to do with the MDL 875 process that has been going on in the Eastern District of Pennsylvania, which involves the transfer of all *real* (that is, *pending*) federal asbestos cases. According to both the district judge who has been presiding over it and the other asbestos defendants who have been involved in it, MDL 875 has been a dramatic success. The original MDL transfer order consolidated 26,639 civil asbestos personal injury cases. By

May of 1991, MDL 875 had grown to 58,478 cases. *In re Asbestos Products Liability Litigation(No. VI)*, 1996 WL 239863 at *1 (E.D.Pa. May 2, 1996). Judge Weiner recently reported that more than 38,000 of those cases have been removed from the active federal docket; some 20,000 through settlements with all parties and over 18,000 by administrative dismissal. *Id.* at *1, *5. This means that 65% of all pending federal cases have been resolved as active matters as to all parties.[13]

This record of achievement was praised by asbestos defendant Owens-Illinois in a brief urging the Third Circuit to reject petitioners' dire warnings about docket collapse if this settlement class action were decertified. Brief *Amicus Curiae* of Owens-Illinois in Opposition to Petition for Rehearing In Banc at 2-3. As a major asbestos defendant that is not a member of the CCR consortium, Owens-Illinois is in a good position to evaluate the impact of decertification of this class action. Owens-Illinois pointed out that only a small fraction of the new cases purportedly filed against some defendants since the initiation of the *Georgine* action (Pet.Br. 2) were filed in the federal courts. Brief *Amicus Curiae* of Owens-Illinois in Opposition to Rehearing at 3. "Judge Weiner's stewardship of MDL 875 has thus significantly reduced the flow of new asbestos-related claims into the federal courts."

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[13] In May of 1996, Judge Weiner dismissed approximately 18,000 asbestos cases from the court's marine docket (claims by crew members exposed on board ships) because those plaintiffs "have no asbestos related injury" and their cases were consequently not "ripe and ready to proceed." *In re Asbestos Products Liability Litigation(No. VI)*, 1996 WL 239863 at *5. The court ruled that those cases "may be individually reinstated" once "[e]ach plaintiff ... has an asbestos-related personal injury." *Id.* Since the court noted that the extraordinary increase (475%) in these uninjured marine docket filings occurred after the MDL transfer and before May, 1996, *id.* at *1 — in short, during the pendency of this settlement class action raising exposure-only claims — this seems to confirm CCR's own analysis that "radical consolidation or class action" experiments induce the filing of marginal or frivolous claims and thereby create misleading surges in asbestos case filings. JA 433.

Id. Furthermore, although the CCR companies have been protected from new filings in any court by the district court's anti-suit injunction in this case, no such protection was afforded the other asbestos defendants. Therefore, although "[d]issolving the injunction may cause plaintiffs in pending cases to implead CCR companies in a significant number of those pending state court cases, ... it does not follow that there will be a flood of new lawsuits in the federal system." *Id.* at 5.

2. Petitioners' argument also rests on a misreading of the Third Circuit decision. The court of appeals did not forbid the use of settlement class actions in mass tort cases. To the contrary, the Third Circuit expressly *approved* settlement class actions "whereby the court postpones formal class certification until the parties have successfully concluded a settlement." Cert. App. 37a n.9. The Court of Appeals added that, in such circumstances, "the court allows the defendant to challenge class certification in the event that the settlement falls apart," *id.* — thus eliminating any risk that a defendant who expresses provisional agreement to a settlement class action would be estopped from challenging the same class if it were to be litigated.

Moreover, petitioners ignore non-class-action means for resolving claims on a collective basis. The Third Circuit expressly contemplated "[a] series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23" as viable means to resolve mass tort cases fairly and efficiently. Cert. App. 57a. Other courts have agreed that "[t]here is reason to believe that even a mass tort like asbestos could be managed, without class certification, in a way that avoids judicial meltdown." *Castano v. American Tobacco Co.*, 84 F.3d 734, 747 n.24 (5th Cir. 1996).

3. Petitioners also contend that the court of appeals' decision would make it difficult for settlements to encompass damages as well as liability issues. Petitioners speculate (citing only four cases as examples, Pet. Br. 36 n.16) that in some contexts damages calculations are too individualized to permit them to be

tried on a classwide basis. Petitioners' concerns in this regard are wholly misplaced.

In the first place, even petitioners' own authorities demonstrate that they have substantially exaggerated the difficulty of trying damages on a classwide basis in litigated class actions. One of the district courts cited by petitioners predicted that "generally accepted" econometric methods could be used to determine "with a reasonable degree of certainty the fact and the amount of damages suffered by the class and each class member" in an antitrust action, so that the assessment of damages might become "an almost mechanical task." *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 154 (E.D. Pa. 1979); *see also Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977) ("it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate"); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976) ("the amount of damages is invariably an individual question and does not defeat class action treatment"); *In re Plywood Antitrust Litig.*, 76 F.R.D. 570 (E.D. La. 1976); 2 NEWBERG ON CLASS ACTIONS § 9.52, at 9-144 ("In many cases, the quantum of damages for the entire class, as well as the issue of liability, may be proved by the class representative as a common issue, thus eliminating the need for individual damages proofs."); *id.* at § 10.01, at 10-2 ("When monetary relief is sought, and when data from each class member are required to assess individual recovery entitlement, it is still possible in most cases for the class representative to develop and prove common guidelines or formulae that will apply to determine the measure of recovery for each individual proof of claim.").

Further, even if petitioners' argument were accepted, it would simply demonstrate the extent to which petitioners seek to expand Rule 23 in this case. For the traditional understanding is that Rule 23 was never intended to permit federal courts to resolve mass personal injury cases, let alone to resolve damages claims that were not appropriate for class treatment. *See, e.g.* Fed.R.Civ.P.

23(b)(3) Advisory Committee Note to 1966 Amendment ("a 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action"); Fed. R. Civ. P. 23(c)(4) Advisory Committee Note to 1966 Amendment ("in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims").

4. Petitioners' policy arguments could not in any event justify overriding the limits of Article III and other fundamental principles of federal litigation. In the end, petitioners' appeals to "pragmatism" and "practicality" are nothing more than a prayer for the judiciary to rush in where Congress has feared to tread. This Court has heard — and rejected — this siren song before: "The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). Yet even "necessity" must bow to the law when the Constitution's structural limitations on governmental power are at stake, because "the Framers ranked other values higher than efficiency." *INS v. Chadha*, 462 U.S. 919, 959 (1983).

5. Fealty to these fundamental principles is especially vital in this case, for the cure proposed by petitioners is worse than any disease they have identified. Petitioners' proposal would inevitably invite and prompt class action settlements that otherwise would not — and should not — take place. It would also likely result in the courts being flooded with legally questionable class actions. Already, public confidence in class action settlements has been eroded by growing reports of settlements of little benefit to class members, marked by outright collusion between opposing counsel or at minimum by none-too-subtle conflicts of interest on the part of class counsel. Petitioners' proposal would only accelerate that trend.

V. PETITIONERS' PROPOSAL IS AT ODDS WITH THE HISTORY OF CLASS ACTION PRACTICE

Petitioners contend that their proposal is supported by the "history" of Rule 23. Pet. Br. 26. Nothing could be further from the truth. The modern class action has antecedents in the historic practices of equity judges and the more recent phenomenon of "managerial judges" who actively participate in case handling and take a forceful role in pressing settlement. The recent application of the settlement class action to mass torts, however, involves a wholly novel combination of features that would have been unthinkable even a decade ago: "plaintiff classes" composed chiefly of hypothetical future claimants, many of whom have yet to suffer a legally cognizable injury; class "actions" with prearranged settlements that could not be certified for trial and are not intended to be tried; huge classes of tort victims "represented" by lawyers chosen by the defendants; decrees purporting to bind absent class members, most of whom have not had an effective opportunity to opt out of the class; settlement decrees that affect claims nationwide and eliminate claims governed by the laws of the 50 different States, with no accounting for variations among the different jurisdictions; and side settlements by class counsel with defendants, giving their current clients different and more favorable relief than the class settlement provides to their other clients — the class of future claimants.

Petitioners' claim that their proposal is consistent with the 1966 Amendments to Rule 23 (Pet. Br. 26-27) is simply unsupportable. There is nothing to indicate that the framers intended the federal courts to certify non-triable cases for settlement. Indeed, the Advisory Committee notes reveal a great deal of hesitancy about even *litigation* class actions, particularly in fraud and mass accident cases. *See, e.g.* Fed.R.Civ.P. 23(b)(3) Advisory Committee Note to 1966 Amendment ("a 'mass accident' resulting in injuries to numerous persons is ordinarily

not appropriate for a class action").[14] Had the Advisory Committee believed that a settlement could be used to resolve a non-triable case in federal court, it would not have inserted these caveats regarding fraud and mass accident cases.

The Advisory Committee also expressed concern about violating "the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." *Id.* Settlement class actions — particularly those involving "future" plaintiffs whose claims have not yet arisen — involve an unprecedented intrusion on this interest. Further, had the Advisory Committee shared petitioners' view that, in the settlement context, the certification inquiry may be collapsed into Rule 23(e), it would not have devoted only a single cursory sentence to that provision. This oversight could hardly have been unintentional; as petitioners observe, settlement is in fact the most common way of resolving class actions in the United States. Pet. Br. 34.

In short, petitioners' proposal is flatly inconsistent with the history — as well as the terms, structure, and purpose — of Rule 23.

VI. AT MINIMUM, THE INJUNCTION AGAINST COLLATERAL ATTACKS MUST BE VACATED

The district court improperly enjoined class members from suing in any other court, thus eliminating the traditional due process right to pursue a collateral attack on a class action in which class members received inadequate representation or were not subject to the court's personal jurisdiction. *See Hansberry v.*

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[14] Judge Frankel conceded that "thoughtful" federal judges might question the "propriety" of opt-out Rule 23(b)(3) class actions as a "radical extension" of federal jurisdiction. Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 45 (1967); *see also* Resnick, *From "Cases to Litigation,"* 54 LAW AND CONTEMP. PROBS. 5, 9-16 (1991) (recounting drafters' intent in detail).

Lee, 311 U.S. 32, 40, 42-45 (1940); *Matsushita Electric Industrial Co. v. Epstein*, 116 S. Ct. 873, 888 (1995)(Ginsburg, J., joined by Stevens and Souter, JJ., concurring in part) ("Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement"); 7B Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1789, at 245 (1986 & 1995 supp.). After they filed suit against CCR in a Maryland state court, respondents Casimir and Margaret Balonis and their attorney were cited by the district court below for civil contempt of this injunction, for having the audacity to assert their due process rights under *Hansberry* and its progeny. The district court thus tried to predetermine the res judicata effect of its own judgment. This it may not do.

Accordingly, at the very least the injunction forbidding collateral challenges must be vacated.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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